

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
SOUTHEASTERN DIVISION

Branden T. Clark, )  
Petitioner, ) Case No. 3:12-cv-02  
-vs- )  
Leann K. Bertsch, ) **ORDER ADOPTING REPORT AND**  
Respondent. ) **RECOMMENDATION**

The Court has received a Report and Recommendation from the Honorable Karen K. Klein, United States Magistrate Judge, pursuant to 28 U.S.C. § 636, recommending that Petitioner Branden T. Clark's (hereafter "Clark") petition for habeas relief be dismissed without prejudice and his motion for release from custody be denied (Doc. #9). Clark has filed objections to the Report and Recommendation, asserting that the exhaustion requirement should be waived in his case. The Court finds the circumstances of this case do not warrant an exception to the exhaustion requirement.

After considering the magistrate judge's Report and Recommendation, conducting a *de novo* review of Clark's objections, and reviewing the entire file, the Court hereby adopts the Report and recommendation in its entirety. For the reasons set forth therein, **IT IS HEREBY ORDERED** that Clark's petition for habeas relief (Doc. #1) be **DISMISSED WITHOUT PREJUDICE** and his motion for release from custody (Doc. #7) be **DENIED**.

Based upon the entire record before the Court, dismissal of the petition is not debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings. Therefore, a certificate of appealability will not be issued by this Court. See Tiedemann v. Benson, 122 F.3d 518, 252 (8th Cir. 1997) (finding that a district court possesses the authority to issue

certificates of appealability under Section 2253(c)). If Clark desires further review of his petition, he may request the issuance of a certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals in accordance with Tiedemann, 122 F.3d at 250-52. The Court further finds any appeal taken by Clark would be frivolous and not be in good faith and, therefore, denies leave to proceed *in forma pauperis* on appeal.

**IT IS SO ORDERED.**

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated this 29th day of February, 2012.

/s/ Ralph R. Erickson  
Ralph R. Erickson, Chief Judge  
United States District Court